No. 347 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA,
Petitioner,

—vs.—

EDWARDS H. CHILDS, Trustee in Bankruptcy of J. MENIST COMPANY (Inc.),
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

ZALKIN & COHEN,
Attorneys for Respondent,
49 Chambers Street,
New York, N. Y.

The Alpert Press, 138 Livingston St., Brooklyn, N. Y. Tel. Main 1058-1059

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RESPONDENT'S BRIEF.

POINT I.

THE COURT BELOW PROPERLY HELD THAT A CLAIM FOR INTEREST AT THE RATE OF ONE PER CENT. PER MONTH IN A BANKRUPTCY PROCEEDING IS A PENALTY AND SHOULD BE DISALLOWED.

Section 57-j of the Bankruptcy Act provides as follows:

> "Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture, shall not be allowed, ex-

cept for the amount of the pecuniary loss sustained by the act, transfer or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

The District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit held that interest on the tax should be allowed up to the date of payment, but that interest at the rate of one per cent. (1%) per month *amounts to a penalty and must be disallowed,* under section 57-j of the Bankruptcy Act.

The United States Government contends that a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals be granted, because of a conflict between the decision of the Circuit Court of Appeals for the *Second Circuit* and the decisions in the *other Circuits* as to the rate of interest to be allowed for the non-payment of taxes after the filing of a petition in bankruptcy.

In support of that contention the Solicitor-General relies upon the case of the *United States vs. Guest,* 143 Fed. 456, as being in variance with the decision in the case at bar. Upon a careful examination of the opinion of the Court in *re United States vs. Guest, supra,* it is clear that the decision is not in conflict with the ruling of the Circuit Court of Appeals for the Second Circuit. In that case no question as to the effect of the Bankruptcy Act upon the rate of interest for the non-payment of taxes arose. An action was brought to recover a judgment upon a certain distiller's bond executed by William A. Morgan as principal with one Tramel & Guest as sureties. The Government sought to recover the sum of $51.15 stamp tax on spirits con-

tained in a certain package removed from one of its distillery warehouses with interest thereon at the rate of one per cent. (1%) per month from the first day of October, 1896, and also for the sum of $88.12 for deficiency spirits during the months of June and July, 1896, with interest at the same rate from the 1st of February, 1897 until paid, together with a penalty of five per cent. (5%) imposed upon said two sums. The Court there held that such interest is not a penalty but is recoverable as interest.

There is, however, no conflict of authority in the Circuit Courts of Appeal as to what rate of interest on tax should be allowed under Section 57-j of the Bankruptcy Act. The only conflict is between the District Court decisions and the Circuit Courts of Appeal decisions.

Re Ashland, Emery & Corundum Co., 229 Fed. 829 Dist. Ct. of Mass.;
Re Clark Realty Co., 253 Fed. 938, Circuit Court of Appeals Seventh Circuit;
Dayton, Trustee, etc. vs. Stanard, Trustee, Pueblo County, Col. 241 U. S. 588.

In *re Ashland, Emery & Corundum Co.* (*supra*), Judge Morton, whose reasoning was followed by both the District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit, says on page 831:

> "If the charge here in controversy is to be regarded as interest, the trustee ought to pay it. Penalties, however, stand upon a different footing. It cannot be said that a penalty imposed for failure to pay a tax, is part of the original tax, in the sense that interest is. By 'interest' is ordinarily understood a charge for the use of money or damages for the detention of it. A

penalty, as applied to cases of this character, means a punishment imposed for failure to make the payment on time. Section 64-a contains no provision for the payment of penalties; and I do not think it can fairly be construed to include them, especially when, as here, the estate was in course of administration during the entire period when they accrued."

and again at page 832:

"Assuming, however, that it is, it seems to me plain, and I accordingly find, that 1% a month exceeds what is fairly required to make good loss to the state for mere delay in the payment of the tax, and as to such excess is not interest, but constitutes a penalty imposed for failure to pay promptly. The actual damages sustained by the State of New Jersey from the delay are not obscure nor difficult to estimate, what the state lost was the use of the money. Its damages, therefore, are the commonest form known to the law, and the most certain of estimation. They are established by statute in New Jersey for individuals at 6% per annum."

In *re Dayton vs. Stanard* (*supra*), a controversy grew out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a Court of Bankruptcy and in construing Section 64-a of the Bankruptcy Act the Court held that the holders of tax certificates who have paid taxes and assessments on property of the bankrupt at tax sales of such property which sales have been declared invalid, are entitled to be reimbursed in the amount paid on cancellation of their certificates out of the general fund of the bankrupt's estate with legal interest *but not* with a larger interest and

penalty imposed by statutes in tax sale redemptions. The Court in this case squarely holds that penalties are not allowed under Section 64-a of the Bankruptcy Act.

The fact that the statute itself calls it interest would not be conclusive upon the Bankruptcy Court, which has the right and power as well as the duty, to examine and decide the question for itself.

The rate of interest allowed in *re Ashland, Emery & Corundum Co.* (*supra*), is probably more common than any other within the United States, and it is to be noted that under Section 6407 of the United States Compiled Statutes, if a plaintiff secures a judgment against the United States, and the Secretary of the Treasury asserts a set-off, any balance found to be payable by the United States over and above the lawful set-off bears interest at the rate of six per cent. per annum.

From an examination of the authorities above cited, it is evident that the question involved in this case is of no great public importance. The Circuit Court of Appeals for the Seventh Circuit is in accord with the Circuit Court of Appeals of the Second Circuit and the Seventh Circuit in *re Clarke Realty Co.* (*supra*), bases its reasoning upon the opinion of Mr. Justice Van Devanter in the case of *Dayton, Trustee vs. Stanard*, 241 U. S. 588.

POINT II.

THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH COSTS.

Respectfully submitted,

MOSES COHEN,
Of Counsel for Respondent.